No. 86-337

IN THE
Supreme Court of the United States
October Term, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

V.

OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Chairman of the Oklahoma Tax Commission; ROBERT T. WADLEY, Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Secretary-Member of the Oklahoma Tax Commission; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, Chairman of the State Board of Equalization of the State of Oklahoma; SPENCER BERNARD; LEO WINTERS; JA[illegible]. CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER; and MIKE TURPEN, Members of the State Board of Equalization of the State of Oklahoma,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. LAWRENCE BLANKENSHIP
GENERAL COUNSEL

DONNA E. COX
FIRST ASSISTANT
GENERAL COUNSEL

OKLAHOMA TAX COMMISSION
2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141

ATTORNEYS FOR RESPONDENTS

September 25, 1986

QUESTIONS PRESENTED

Whether the federal district courts may require a preliminary showing of purposeful overvaluation with discriminatory intent to establish subject matter jurisdiction conferred in 49 U.S.C. §11503 to prevent discriminatory state taxation in a case alleging only de facto discrimination in the state's valuation of rail transportation property for ad valorem tax purposes?

Whether the federal district courts may decide fundamental subject matter jurisdiction without affording the complaining railroad an evidentiary hearing to make a preliminary showing of purposeful overvaluation with discriminatory intent?

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STATEMENT OF OPPOSITION TO THE WRIT

Respondents, the Oklahoma Tax Commission, each of its three contemporaneous members, the State Board of Equalization of the State of Oklahoma, and each of its seven contemporaneous members[1], respectfully oppose the issuance of a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on May 2, 1986. The decision of the Tenth Circuit in this proceeding is not in conflict with any decision of another federal court of appeals on the same matter, nor does it sanction an unacceptable departure by the lower court from the usual course of judicial proceedings.

The decision applied a threshold jurisdictional requirement, a showing of purposeful overvaluation with discriminatory intent, enunciated in **Burlington Northern Railroad Company v. Lennen,** 715 F. 2d 494 (10th Cir. 1983) cert. denied 104 S. Ct. 2690 (1984). The threshold jurisdictional requirement was applied to a peculiar set of facts that is not likely to recur, facts that occurred in an attempt to assure Oklahoma's assessment process complied with §11503. And, rather than create conflict among the circuits, this decision is a complement to the network of heterogeneous factual cases decided by the circuits.

STATEMENT OF THE CASE

Petitioner sought declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma under 49 U.S.C. §11503, formerly §306 of the Railroad Revitalization and Regulatory Act of 1976, P.L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976), from an alleged de facto overvaluation of its taxable rail transportation

[1]The attorneys for the Oklahoma Tax Commission, at the request of the State Attorney General, entered appearance on behalf of the State Board and the named members in the District Court and represented all Respondents in the Tenth Circuit. The Oklahoma Tax Commission is authorized to represent the interests of the State of Oklahoma in 68 O.S. 1981, §§105 and 232.

property in Oklahoma for the 1982 ad valorem tax assessment. Petitioner, at the time of filing the complaint dismissed in this proceeding and at the present time, had and has an administrative protest challenging the 1982 valuation pending before the State Board of Equalization of the State of Oklahoma pursuant to 68 O.S. 1981, §2466, appealable to the Oklahoma Supreme Court and then to this Court.[2]

In its Complaint, filed March 3, 1983, Petitioner sought relief of its valuation only, without any challenge to the allocation factor, the assessment ratio, or the valuation methodology or the valuation of commercial-industrial property. Respondent, Oklahoma Tax Commission, on March 25, 1983, motioned the District Court to dismiss the Complaint for want of subject matter jurisdiction, under 49 U.S.C. §11503 and 28 U.S.C. §1341, to hear pure valuation controverises arising out of the administration of state or local ad valorem taxes. Response to the Complaint with Appendices was filed on April 21, 1983, providing detailed explanation of the 1982 assessment process and records of the official assessment acts.[3]

After the decision in **Burlington Northern Railroad Company v. Lennen,** 715 F. 2d 494 (10th Cir. 1983) cert. denied 104 S. Ct. 2690 (1984), Petitioner amended its Complaint to include the conclusionary jurisdictional allegation that Respondents "purposely overvalued Burlington Northern's property with discriminatory intent."[4] After lengthy discovery and briefing relating to the issues of subject matter jurisdiction and procedure for pre-trial

[2]Burlington Northern Railroad Company has pending state administrative protests for 1982, 1983, 1984 and 1986. The 1982 and 1983 protests were stayed at the request of Burlington Northern Railroad Company pending the federal court litigation. The 1984 protest has been fully tried although the findings of the administrative law judge have not been issued. See Appendix pages A-24 — A-27.

[3]Appendix pages A-8 — A-22.

[4]Petitioner's Appendix pages 40a — 41a.

jurisdiction consideration, the District Court ordered Petitioner to present its jurisdictional facts tending to show discriminatory overvaluation. Determination of subject matter jurisdiction is fundamentally preliminary to the Court's power to exercise control over the cause. **Leroy v. Great Western United Corporation,** 443 U.S. 173, 1980, 99 S. Ct. 2710, 61 L. Ed. 2d 464, 472 (1979).

In dismissing the Complaint for failure to make a showing of purposeful overvaluation with discriminatory intent, the District court found that Oklahoma's assessment process for 1982 substantially changed from that used in years past, including that used in 1981, and marked a clean break with the past; that the 1982 assessment percentage used to assess all rail transportation property was the average assessment percentage used at the county level to assess commercial and industrial property; that the 1982 valuation methodology or formula used to value rail transportation property was changed to give greater emphasis to capitalized income; that the termination of assessment conferences with the railroad tax managers allowed greater uniformity in the assessment of rail transportation property process; that Petitioner's annual assessments have constantly decreased every year since 1976; that Petitioner's 1981 self-assessment was substantially greater than the challenged 1982 assessment; and, that Petitioner failed to establish a prima facie case of intentional discrimination.[5]

In affirming the District Court dismissal, the Tenth Circuit Court of Appeals noted that Petitioner did not allege " . . . any procedure that on its face demonstrated valuation discrimination against railroads, . . . " or " . . . facts from which a trier of fact reasonably could infer discriminatory intent, . . . "[6] and that the 1982 assessment process broke the earlier pattern with a new system clearly

[5]Petitioner's Appendix pages 7a — 17a.
[6]Petitioner's Appendix pages 3a — 4a.

reflecting an attempt to comply with §11503. And, the Tenth Circuit noted that Petitioner is not prevented from pursuit of its state administrative and court remedies to settle the actual market value challenge.[7]

STATUTORY PROVISION INVOLVED

49 U.S.C. §11503 is set forth in the Appendix at A-1.

Petitioner asserts that review in this proceeding is imperative because the Tenth Circuit has thwarted the clear, unequivocal mandate of Congress, implicit in §11503, that the federal courts shall set the standard for valuation of rail transportation property for ad valorem tax purposes and correct the state's valuation, case by case. This assertion is untenable.

Section 11503 is an exercise of the Commerce Clause powers. In subsection (a) of §11503, Congress defined four essential terms: (1) assessment, (2) assessment jurisdiction, (3) rail transportation property and (4) commercial and industrial property. Congress did not define true market value, valuation nor equalization. In subsection (b) of §11503, Congress declared four acts to unreasonably burden and discriminate against interstate commerce: (1) assessment of rail transportation property at a value (assessed value) which has a higher ratio to true market value than the assessed value of other commercial-industrial property in the assessment jurisdiction to true market value; (2) levy or collection of a tax on an assessed value determined in violation of (b)(1); (3) levy of a tax rate on the assessed value of rail transportation property in excess of the tax rate on the assessed value of other commercial-industrial property in the same assessment jurisdiction; or, (4) levy of another tax that discriminates against a rail carrier providing transportation.

Subsection (b) does not limit the state's authority to frame its true market value standards (valuation formula or

[7]Petitioner's Appendix page 5a, footnote 1.

methodology) for valuing rail transportation property. It preserves the state's authority to exercise the essential and fundamental steps in the assessment process limiting that authority only to prevent discriminate favor to other commercial and industrial property. This limitation contemplates that a state may not indiscriminately assess, at the same assessment percentage of true market value, both rail transportation property and other commercial industrial property, as was the case in 1965. This is equalization discrimination which, in 1965, occurred in most states.[8] In the instant case, the state's valuation formulas for rail transportation property and commercial-industrial property were uniformly utilized and a single assessment percentage, 10.86%, was utilized in the assessment process, as preserved to the states by §11503.

In subsection (c) of §11503, Congress vested jurisdiction in the United States District Courts to prevent or enjoin a violation of subsection (b), concurrent with other jurisdiction of the federal and state courts, and limited that jurisdiction to prevent de facto violation only if the ratio of assessed value to true market value of rail transportation property exceeds, by at least five percent, the ratio of assessed value to true market value of other commercial and industrial property.

Petitioner urges the necessity for a broad construction of the declared discriminatory acts prohibited and the judicial remedy created in §11503. The Congressional history of §11503 directs otherwise. The Congressional history, replete with testimony of the railroad representatives who promoted and secured passage of Section 306, now §11503, clearly indicates that the authority of a state to value rail transportation property in accordance with its standards and methods formulated under its laws would not be affected by §306; that §306 would not be triggered until

[8]S. Rep. No. 1483, 90th Cong., 2nd Sess. (1968).

after valuation.[9]

For over a decade the railroads generally through their legal counsel, appeared before succeeding Congresses on precursor bills to §306 and before various standing Committees or Subcommittees and represented that §306 did not empower or require the federal courts to calculate, arbitrate or determine fair market values. Members of Congress were concerned that §306 might impose non-judicial functions upon the federal courts in view of the recent decision in **Moses Lake Homes Inc. v Grant County, Washington,** 365 U.S. 744, 81 S. Ct. 870, 6 L. Ed. 2d 66 (1961). In response to this concern, Professors Paul H. Sanders and Paul J. Hartman, Vanderbilt University, in a legal memorandum to the Committee on Commerce,

[9]S. Rep. No. 1483, 90th Cong., 2nd Sess. (1968), accompanying S. 927, at p. 1 states that the "remedy in the Federal courts for common and contract carriers is against the collection of the excessive portion of any tax based upon such unlawful assessment or rate."

Testimony of Mr. Phillip M. Lanier, Vice-President for Law, Louisville and Nashville Railroad Company, also speaking on behalf of the Association of American Railroads, before the Senate Subcommittee on Surface Transportation of the Committee on Commerce relative to S. 2289, 91st cong., 2d Sess., a successor bill to S. 927, p. 39 is that "The (valuation) formula varies from State to State and we are not dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate." Before the same subcommittee hearings, Mr. Broley E. Travis advocated that the federal courts must be involved in valuation, "Well, I believe, it would be my impression, being an engineer, and not an attorney, that the Federal Courts would have to review both the valuation as made by the administrative officers, and the equalization."

The Senate Committee on Commerce rejected Travis' argument; by appendix to the report adopted or readopted the comments on true market value as expressed in regard to S. 027, including a finding that S. 2289 does not require or suggest that states change their assessment standards or practices and thereby plainly stated that S. 2289 is not a standard for determining value.

And, testimony of Mr. Lanier before the House of Representatives, H.R. 1624, 91st Cong., 1st Sess., (1970) at pp. 138-139, states, "On the valuation —this bill would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation . . . it is only in the area of equalization of the computed value that this legislation speaks. That is where our problem is . . . Because we are speaking in terms of uniformity of the equalization ratio, . . . once the fair market value is determined, . . . "

opined that S. 927 did not impose any invalid or non-judicial function upon the federal courts to perform tax assessment functions; and, that the federal courts can and should construe the legislation to avoid any charge that a non-judicial function must be performed.[10]

In **Moses Lake,** supra, a proceeding ancillary to condemnation, ad valorem tax assessments of Grant County, Washington were challenged under the Wherry Act, National Housing Act, §§801-809, 12 U.S.C. §§1748-1748h-1. Similar to the required comparison of rail transportation property and other commercial-industrial property in §11503, the statute involved in **Moses Lake** authorized taxation of government leaseholds not in excess of the taxation of non-government leaseholds. This Court noted the discriminatory assessment of non-government leaseholds at 50% of fair value and government leaseholds at 100% of fair value. The United States Court of Appeals for the Ninth Circuit ruled that the higher taxes at issue did not invalidate the entire tax; that the taxes should be reduced to comply with the Wherry Act; and, remanded to the district court to make the necessary reductions to the assessments. This Court reversed the Ninth Circuit stating, "Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." **Id.** 365 U.S. 752. This pronouncement was the authority for Professors Sanders and Hartman's message to Congress that the federal courts must avoid non-judicial functions, i.e., supervising the valuation or appraisal of rail transportation property.

The Congressional history has been reviewed by most of the federal courts for guidelines in interpreting the issue of subject matter jurisdiction in §11503. **Ogilvie v. State Board of Equalization,** 657 F. 2d 204 (8th Cir. 1981); **Trailer Train**

[10]S. Rep. No. 1483, 90th Cong. 2d Sess. (1968) accompanying S. 927, p. 12.

Company v. State Board of Equalization, 697 F. 2d 860 (9th Cir. 1981); **Burlington Northern Railroad Co. v. Lennen,** 715 F. 2d 494 (10th Cir. 1983). The federal courts have consistently found that the exception to 28 U.S.C. §1341 in §11503 must be construed in view of its history. **Lennen,** supra, **Atchison Topeka and Santa Fe Railway Company v. State Board of Equalization of the State of California,** 795 F. 2d 1442 (9th Cir. 1986). This history does not support Petitioner's request for urgent broad construction of §11503 by this Court.

DECISIONS OF THE OTHER CIRCUITS

Elementary to this Petition is Petitioner's sentiment that it was right in **Lennen,** supra, 715 P. 2d 494 (1983) cert. denied 104 S. Ct. 2690 (1984). The trial court in **Lennen** granted injunctive relief on the equalization claim but refused to grant injunctive relief on the valuation claim. The Tenth Circuit, in **Lennen** found an absence of specific statutory direction and an absence of specific Congressional intent that the federal district courts should be involved in the intricacies of the valuation process. **Id.** p. 497. The Tenth Circuit did not close the federal courts to valuation discrimination. It required a showing of discrimination to establish subject matter jurisdiction. The Tenth Circuit, in **Lennen,** recognized the express exception to 28 U.S.C. §1341 but refused to extend the exception so as to allow the railroads to escape the noninterference mandate of §1341 for any and all ad valorem tax challenges.

In **Lennen,** Burlington Northern had alleged that Kansas increased the 1982 valuations in retaliation for the equalization relief from the 1981 assessments. The trial court found no retaliation. However, the trial court ruled that if the railroad could make a strong showing of deliberate overvaluation in retaliation for past equalization relief, then valuation relief could be granted. Thus, the allegations in **Lennen** required the Tenth Circuit to fashion a jurisdictional rule, in addition to the recognized general

§1341 noninterference rule.

In the instant proceeding, the valuation allegations and evidentiary record were insufficient to bring Petitioner within the prohibitions in §11503. Both the noninterference rule of §1341 and the jurisdictional rule set forth by the trial court in **Lennen** were argued. When this Court denied certiorari in **Lennen,** the complaint herein was amended to include jurisdictional allegations required in **Lennen,** thus the trial court needed not to consider the §1341 argument.[11]

In **Atchison Topeka and Santa Fe Railway Company v. Board of Equalization of the State of California,** 795 F. 2d 1442 (9th Cir. 1986) the trial was separated into three phases. In phase I the court reviewed the state's valuation methodologies for rail transportation property and other commercial industrial property and found no discrimination. The railroads allege errors by California in application of the methodology and use of inflated figures.

The trial court found it had jurisdiction to evaluate methodology and equalize ratios, but it did not have jurisdiction to hear valuation claims, phase II. The Ninth Circuit reversed the ruling on jurisdiction to hear valuation claims, but, under the particular situation of that case, pending state court litigation, the Ninth Circuit ordered abstension. Quoting **Lennen,** the Ninth Circuit recognized that an overly broad construciton of §11503 would significantly burden the federal judiciary and that §11503 is an exception to §1341 but not to the general principles of abstension. Holding the railroads to their decision to file suite both in state and federal court on the same issue, the Ninth Circuit deferred to the state courts.

The Ninth Circuit decision is not in conflict with the Tenth Circuit. The two circuits approached the threshold jurisdictional issues as dictated by the facts and circumstances of each case.

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[11]Burlington Northern's federal action for valuation relief from the 1983 assessment is pending. Appendix pages A-3 — A-7.

In **Burlington Northern Railroad Company v. Bair,** 766 F. 2d 1222 (8th Cir. 1985) de jure and de facto discrimination were alleged. Injunction issued against the de jure discrimination. De facto discrimination was claimed based upon both valuation and equalization. At p. 1225, the Eighth Circuit stated "Burlington Northern has not appealed the District Court's May, 1984 dismissal of the claim alleging overvaluation. However, the railroad does pursue its claim under section 306 (1)(a) for proper equalization." The Eighth Circuit distinguished its equalization case from the **Lennen** overvaluation case. On remand from the Eighth Circuit, in the equalization-valuation confusion of this case, the Eighth Circuit may be similarly situated as was the Ninth Circuit in **Moses Lake,** supra.[12]

In **Louisville and National Railroad Company v. Department of Revenue, State of Florida,** 736 F. 2d 1495 (11th Cir. 1984) the issue was assessment ratio equalization. The parties stipulated that rail transportation property was assessed at 100% of its value and that other commercial-industrial prpoerty is assessed at less than 100%. The issue was what is the level of assessment of commercial-industrial property. This case is not inconsistent with the **Lennen** jurisdictional rule. Citing **Lennen,** the Eleventh Circuit stated, "In evaluating these contentions, we begin by observing that the bar of section 11503 extends to de facto discrimination as well as de jure." p. 1498. In discussing de facto discrimination the Eleventh Circuit said, "Discriminatory intent is not a precondition to recovery once disparate impact is shown." p. 1498.[13] Florida's application of its factors in determining just value (true market value) of commercial-industrial property resulted in substantial undervaluation, thus discriminatory intent was not a precondition to relief.

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[12]Petitioner's Appendix, pp. 43a-70a.

[13]At page 15, footnote 17, Petitioner omits "once disparate impact is shown." from its quote of the 11th Circuit.

Undervaluation of locally assessed commercial-industrial property was also the basis of the discrimination claim in **Southern Railway Company v. State Board of Equalization,** 715 F. 2d 522 (11th Cir. 1983). The Georgia Department of Audits sales ratio study showed that local nonrail property was preferentially assessed at far below 40% of fair market value as required by state law. As Florida did in the **Louisville and National Railroad** case, 736 F. 2d 1494 (11th Cir. 1984), Georgia made the railroads jurisdictional showing. Such facts or circumstances are not in the instant case nor the challenged **Lennen** case.

And, the decision of the Fourth Circuit in **Richmond, Fredericksburg and Potomac Railroad Company v. Department of Taxation of Virginia,** 762 F. 2d 375 (4th Cir. 1985), is not inconsistent with **Lennen.** The Fourth Circuit, at page 379, held, "Accordingly, a journey into the jungle of legislative history is unnecessary because we hold that §306 (1)(d), on its face, clearly and unambiguously prohibits all forms of discriminatory taxation of railroads."[14]

The ad valorem tax litigation under §11503, since its effective date in 1979, involves a myriad of factual situations circumstances. These heterogeneous fact situations often were due to the states' attempts to comply with §11503 as well as avoid §11503. The states are working to establish appraisal standards that will be acceptable among them.[15] This case does not threaten the principal purposes of §11503 and it does not present sufficient scope for this Court to provide guidance to all the states and the federal judiciary. The differing factual scenarios prevent direct conflict among the circuits, thus review by this Court is not warranted.

[14]§306 (1)"(d) The impositin of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." At page 14, Petitioner again omits the Court's language which distinguishes that case from **Lennen.**

[15]International Association of Assessing Officers, "News Bulletin," September, 1985, Vol. 7, No. 9, 1 SSN 07414609, announced copies available of the Post-Conference Report of the National Conference on Unit Valuation Standards, the conference was attended by 24 states in 1984 and 1985 in Denver, Colo and will be held in Dallas, Texas in Dec. 1986.

REASONS FOR DENYING THE WRIT

The factual determination by the District Court, concurred in by the Tenth Circuit, do not warrant certiorari. **Graves Manufacturing Co. v. Linde Co.,** 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1948); **Appalacian Power Co. v. American Institute of Certified Public Accountants,** 361 U.S. 82, 80 S. Ct. 16 (1961). Review of decisions of administrators, absent proof that a discriminatory purpose has been a motivating factor, does not warrant certiorari. **Village of Arlington Heights v. Metropolitan Housing Development Corporation,** 429 U.S. 252, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977). Review of evidence and specific facts before the District Court does not warrant certiorari. **United States v. Johnson,** 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1924). The scope of the legal issue in this proceeding is episodic and limited by the factual determinations and does not warrant certiorari. **Rice v. Sioux City Cemetery,** 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954). The legal issue in this proceeding is not an important question touching the accommodation of state and federal interests and does not warrant certiorari. **Kosydar v. National Cash Register Co.,** 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1954). The questions presented do not bring this proceeding within Rule 17 and do not warrant certiorari.

CONCLUSION

The Tenth Circuit's decision does not directly undermine Congress' considered resolution of a serious national problem. The decision does not decide a substantial legal issue of general importance to the judicial administration of §11503. The decision is not sharply out of line with the decisions of other Courts of Appeals.

The challenge presented to the District Court in this

proceeding was not within the enumerated acts of discriminatory taxation declared by Congress in §11503. The challenge is a pure valuation claim. The Courts below relegated Petitioner to its state court remedies.

The opinions below serve judicial economy and preserve both the federal and state interests in the administration of ad valorem taxation of rail transportation property. The narrow issue in this proceeding does not warrant issuance of a writ of certiorari.

For these reasons, Respondents respectfully oppose issuance of a writ of certiorari to review the order and judgment of the United State Court of Appeals of the Tenth Circuit in this proceeding.

Respectfully submitted,

J. LAWRENCE BLANKENSHIP
GENERAL COUNSEL

DONNA E. COX
FIRST ASSISTANT
GENERAL COUNSEL

OKLAHOMA TAX COMMISSION
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
(405) 521-3141

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari were deposited in the United States post office in Oklahoma City, Oklahoma on the 30th day of September, 1986, with first-class postage prepaid, addressed to counsel of record for the Petitioner.

DONNA E. COX

INDEX TO APPENDIX

APPENDIX

§11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

BURLINGTON NORTHERN
RAILROAD COMPANY,

Plaintiff,

vs. NO. CIV-83-419R

OKLAHOMA TAX COMMISSION;
ODIE A. NANCE, CHAIRMAN OF
THE OKLAHOMA TAX
COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF
THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL,
SECRETARY-MEMBER OF THE
OKLAHOMA TAX COMMISSION;
STATE BOARD OF
EQUALIZATION OF THE STATE
OF OKLAHOMA; GEORGE NIGH,
CHAIRMAN OF THE STATE
BOARD OF EQUALIZATION OF
THE STATE OF OKLAHOMA;
SPENCER BERNARD; LEO
WINTERS; JACK CRAIG;
CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN,
MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF
THE STATE OF OKLAHOMA,

Defendants.

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Plaintiffs,

vs. NO. CIV-83-2165-R

OKLAHOMA TAX COMMISSION; ODIE A. NANCE, CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; ROBERT T. WADLEY, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; J. L. MERRILL, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA; GEORGE NIGH, CHAIRMAN OF THE STATE BOARD OF EQUALIZATION OF THE STATE GF OKLAHOMA; SPENCER BERNARD; LEO WINTERS; JACK CRAIG; CLIFTON SCOTT; DR. LESLIE FISHER, and MIKE TURPEN, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF OKLAHOMA,

Defendants.

(Filed April 29, 1985)

ORDER

On January 8, 1985 the Court granted the Defendants' Motions to dismiss for lack of subject matter jurisdiction in the above styled cases. The Plaintiff timely filed a Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration of Judgment pursuant to Fed. R. Civ. P. 59, to which the Defendants responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it, and an unrelated Motion for Consolidation, in this Order.

It must first be noted that the Plaintiff's motion is cognizable only as a Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59 (e). **See Cook v. Atlantic Richfield Co.,** No. CIV-83-1717-R (W.D. Okla. March 20, 1985). A Motion for New Trial pursuant to Fed. R. Civ. P. 59 (a) is appropriate only where trial on the merits has been conducted, **see Jones v. Nelson,** 484 F. 2d 1165, 1167 (10th Cir. 1973), and no such trial has been conducted in either of these cases. However, it is clear that the Plaintiff's Fed. R. Civ. P. 59 (e) motion properly challenges the Court's January 8 order of dismissal. **Cook, slip op.** at 1. **See also St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.,** 684 F. 2d 691, 693 (10th Cir. 1982).

The Plaintiff first argues that the order of dismissal should be vacated in the 1982 tax case, No. CIV-83-419-R, for two reasons: (1) The Court erred in determining the jurisdictional issue without hearing live testimony; and, (2) the Plaintiff has discovered new evidence of discriminatory intent regarding the 1982 tax year. The second proposition is now moot, as the Court has refused to allow discovery from the witnesses that the Plaintiff sought to depose for its newly discovered evidence. **Burlington Northern Railroad Co. v. Oklahoma Tax Commission,** No. CIV-83-419-R, **slip op.** at 2-3 (W.D. Okla. Jan. 23, 1985). And the first proposition is without merit. The Court considered the

facts bearing upon jurisdiction in the light most favorable to the Plaintiff, and live testimony would have lent nothing to the Plaintiff's abortive attempt to establish a **prima facie** case of intentional discrimination. The Plaintiff again seeks to have the Court hear the merits of the action before deciding the jurisdictional question, a procedure rejected as violative of the restrictive jurisdictional rule announced in **Burlington Northern Railroad Co. v. Lennen,** 715 F. 2d 494 (10th Cir. 1983), **cert. denied** 104 S. Ct. 2690 (1984). **See Burlington Northern V. Oklahoma Tax Commission,** No. CIV-83-419-R, **slip op.** at 7-9 (W.D. Okla. Jan. 8, 1985). The Court therefore concludes that the Plaintiff's motion is denied insofar as it seeks a vacation of the order of dismissal in the 1982 tax case.

However, the Court is persuaded that the motion must be granted insofar as it challenges dismissal in the 1983 tax case, No. CIV-83-2165-R. The Court, noting that the Plaintiff had failed to supplement the record in connection with its opposition to dismissal in the 1983 case, concluded that the Plaintiff intended to support its jurisdictional allegations in both cases with the same evidence. **See Burlington Northern Railroad Co. v. Oklahoma Tax Commission,** No. CIV-83-2165-R, **slip op.** at 15 (W.D. Okla. Jan. 8, 1985). However, the Plaintiff now contends, and the Defendants do not seriously dispute, that the parties had agreed to litigate the jurisdictional question in the 1983 tax case only after the Court had ruled on the similar question in the 1982 tax case. The record reflects at least a tacit agreement between the parties, and the Court concludes that the lack of an evidentiary record in No. CIV-83-2165-R results from this agreement. The order of dismissal in the 1983 tax case was therefore premature, and the Court accordingly grants the Plaintiff's motion to the extent that the order of dismissal in No. CIV-83-2165-R is vacated.

There can be little doubt that the Plaintiff intends to appeal the Court's dismissal of the 1982 tax case upon receipt of this Order. Indeed, the Court prefers that its decision be examined on appeal before further proceedings are had in the 1983 tax case. Accordingly, the Plaintiff's Motion for Consolidation of the two cases is denied, and No. CIV-83-2165-R is stayed pending appeal of No. CIV-83-419-R. For the duration of the stay No. CIV-83-2165-R shall be administratively closed, to be reopened upon final dispositin of No. CIV-83-419-R.

In summary, the Court reaches the following conclusions:

1. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration of Judgment is denied to the extent that it challenges dismissal of No. CIV-83-419-R.
2. The Plaintiff's Motion For New Trial, Or In the Alternative, For Vacation, Amendment, Or Alteration, of Judgment is granted to the extent that it challenges dismissal in No. CIV-83-2165-R.
3. The order of dismissal in No. CIV-83-2165-R is vacated.
4. The Plaintiff's Motion for Consolidation is denied.
5. Case No. CIV-83-2165-R is stayed and administratively closed pending appeal of the Court's decision in Case No. CIV-83-419-R.

The parties are directed to keep the Court apprised of the appellate proceedings in No. CIV-83-419-R.

IT IS SO ORDERED this 29th day of April, 1985.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

BURLINGTON NORTHERN
RAILROAD COMPANY,

Plaintiff,

vs. NO. CIV-83-419R

OKLAHOMA TAX COMMISSION,
ODIE A. NANCE, CHAIRMAN OF
THE OKLAHOMA TAX
COMMISSION; ROBERT T.
WADLEY, VICE-CHAIRMAN OF
THE OKLAHOMA TAX
COMMISSION; J. L. MERRILL,
SECRETARY-MEMBER OF THE
OKLAHOMA TAX COMMISSION;
STATE BOARD OF
EQUALIZATION OF THE STATE
OF OKLAHOMA; GEORGE NIGH,
CHAIRMAN OF THE STATE
BOARD OF EQUALIZATION OF
THE STATE OF OKLAHOMA;
SPENCER BERNARD; LEO
WINTERS; JACK CRAIG;
CLIFTON SCOTT; DR. LESLIE
FISHER; and MIKE TURPEN,
MEMBERS OF THE STATE
BOARD OF EQUALIZATION OF
THE STATE OF OKLAHOMA,

Defendants.

(Filed April 21, 1983)

RESPONSE OF DEFENDENT OKLAHOMA TAX COMMISSION TO COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Defendant Oklahoma Tax Commission, Odie A. Nance, Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman of the Oklahoma Tax Commission, and J. L. Merrill, Secretary-Member of the Oklahoma Tax Commission, for answer and defense to the allegations set forth in the Complaint For Injunctive and Declaratory Relief denies each and every such allegation except as hereinafter expressly admitted. The following numbered paragraphs of this Response correspond to the numbered paragraphs of the Complaint.

1. Defendant admits 49 U.S.C. §11503 grants this Honorable Court jurisdiction, concurrent with state courts of Oklahoma, to prevent ad valorem tax discrimination against rail transportation property where and only if:

(a) the **assessment ratio** of assessed value to true market value of such rail transportation property is greater than or exceeds by at least five percent (5%) the assessment ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction; or,

(b) the **tax millage rate** (levy) of any local taxing jurisdiction applied to the assessed valuation of rail transportation property is greater than or exceeds the tax millage rate of same local taxing jurisdiction applied to commercial and industrial property in the same assessment jurisdiction.

Defendant specifically denies that it is a proper party to this purported action as Defendant neither assesses, levies or collects ad valorem tax. Defendant is the fact gathering

arm of the State Board of Equalization. Defendant's duty is to receive annual ad valorem tax reports from the various railroad and public service corporations that operate within the State of Oklahoma and thereupon to make findings of valuation and recommendations of assessment purposes. 68 O.S. 1981, §2454. Further, as assistance to the State Board, Defendant has a duty to make investigations and inspections when necessary to assure that no such property escapes taxation. 68 O.S. 1981, §§2454 and 2455. Defendant has no statutory duties or powers to assess, levy or collect ad valorem taxes in the State of Oklahoma. The Oklahoma Constitution, Article X, §21 mandates the State Board of Equalization **assess** property of railroads; and, Article X, §9 prohibits the state from levying any ad valorem tax.

Defendent specifically denies that **any** of its acts are subject to the prohibition in 49 U.S.C. §11503.

Active concert and active participation under Rule 65(d) of the Federal Rules of Civil Procedure is a question of fact for the Court, and Defendant requests Plantiff be required to make a strict showing thereof. Defendant denies that any person not named as a Defendant herein has or is acting in active concert or active participation regarding any of the allegations set out in the Complaint herein. 61 A.L.R. Fed. 402.

On April 25, 1982, the Oklahoma Tax Commission laid its recommendations for 1982 ad valorem tax assessments of railroad and public service corporation property before the State Board of Equalization. (Defendant's Appendices: A.)

On May 19, 1982, the State Board of Equalization assessed the property of railroad and public services corporations for ad valorem tax purposes. (Defendant's Appendices: B.)

The 1982 ad valorem tax assessment recommended by

the Oklahoma Tax Commission on April 25, 1982 and assessed by the State Board of Equalization on May 19, 1982 is not excessive nor unlawful under 49 U.S.C. §11503 as:

(a) The average statewide assessment ratio applied to true market value (use value) of commercial and industrial property as determined from the 1981 ratio study of the levels of local assessments of commercial and industrial property is 10.87%. (Defendant's Appendices: C)

(b) That assessment percentage, 10.87%, was applied to the true market value (use value) of the railroad property of Plaintiff for calculation of 1982 assessed valuation.

JURISDICTION

2. Defendant specifically denies that this Court has subject matter jurisdiction over the purported Complaint filed herein. (Defendant's Motion to Dismiss and Brief in Support filed herein.)

(a) 49 U.S.C. §11503 does not confer subject matter jurisdiction upon the federal courts except to prevent the four specified acts declared therein to unreasonably burden and discriminate against interstate commerce, to-wit:

"(1) excessive assessment percentage or ratio;
(2) levy upon an assessed value calculated with an excessive assessment percentage;
(3) excessive millage levy; or
(4) imposition of another discriminatory tax.

As set out in paragraph numbered 1., Plaintiff's rail transportation property, for 1982 as valorem tax purposes in Oklahoma, was assessed at 10.87 assessment ratio which is the same, exact statewide average assessment ratio applied to local assessed commercial and industrial

property as determined from the most current completed study of levels of assessment by county assessors within Oklahoma as of April 25, 1982.

(b) 28 U.S.C. §1341 bars subject matter jurisdiction granted under 28 U.S.C. §1337.

(c) 28 U.S.C. §1341 bars subject matter jurisdiction granted under 28 U.S.C. §1331.

PARTIES

3.-10. Defendant admits Plaintiff's allegations in paragraphs numbered 3. - 10.

AD VALOREM TAXATION IN OKLAHOMA

11. Defendant admits that 64 O.S. 981, §2404 specifies property subject to ad valorem taxation in Oklahoma. The Oklahoma Constitution, Art. X, Section 6 specifies property exempt from ad valorem taxation and Art. V, Section 50 prohibits the Legislature from enacting any law exempting property from taxation except as provided in the Constitution.

12. Defendant admits that 68 O.S. 1981, §2427 mandates the county assessor shall assess all property subject to local assessment. Defendant specifically denies that §2427 is pertinent or applicable herein.

13. Defendant admits that 68 O.S. 1981, §2444 is the legislative mandate, required by Oklahoma Constitution Art. V, §59, that the local millage (tax levies) be uniform upon all taxable property within the taxing jurisdiction. Defendant specifically responds that it is this uniformity that precludes subject matter jurisdiction herein under 49 U.S.C. §11503, (b)(3).

Defendant specifically denies that every railroad, including Plaintiff, does make its return on or before March 15 of each year. Defendant specifically responds that under

68 O.S. 1981, §2453, the Oklahoma Tax Commission may extend the time for 15 days. Plaintiffs filed its verified return form on March 31, 1982, returning no value for track and right of way; and later other information was filed. (Defendant's Appendices: D.)

14. Defendant specifically admits that under 68 O.S. 1981, §2454 the Oklahoma Tax Commission is enjoined with mandatory, discretionary duties to assist the State Board of Equalization in the assessment of real and personal rail transportation property of Plaintiff. Defendant specifically responds that the Oklahoma assessment procedure requires three steps: (1) full valuation X (2) assessment percentage = (3) assessed valuation. (**Cantrell v. Sanders,** 610 P. 2d 227 (Okl: 1980).

Defendant specifically responds that the procedures for recommendations of assessment of rail transportation property, the Oklahoma Tax Commission determines full system unit value allocated to Oklahoma and applies the assessment percentage thereto to calculate recommended assessed value:

(1) original cost of assets X 40%

(2) capitalized net operating income X 60%

(3) = system value X allocation factor X assessment percentage = assessed value.

(Capitalized net operating income is calculated by weighting the last three years income the most recent year 3, next most recent year 2 and last most recent year 1, capitalized at 14% for 1982 calculation.)

(Original cost is based upon cost paid during early statehood for a great portion of Plaintiff's rail transportation property.)

(Allocation is based upon seven factors **as reported** by the Plaintiff.) (Defendant's Appendices: D and E.)

Further Defendant specifically responds that the Okla

homa Tax Commission has a clear, specific statutory dutyL to make its recommendation to the State Board of Equalization as to assessment of railroad property of Plaintiff, on or before April 25 of each year. (68 O.S. 1981, §2454); that the 10.87 assessment percentage or ratio was recommended to the State Board of Equalization for the specific, stated purpose of compliance with the 4-R Act, 49 U.S.C. §10101, et seq. (Defendant's Appendices: A); that during 1981, in its equalization of the local assessments, the State Board of Equalization rejected the findings and recommendations of the Oklahoma Tax Commission for equalization; that the validity of the 1981 Ratio Study of the levels of local assessment was attacked and presented to the Oklahoma Supreme Court in **Poulos v. State Board of Equalization, et al.,** 646 P. 2d 1269 (Okl: 1982) (Poulos III) decided May 25, 1982, six days after the May 19, 1982 assessment involved herein; that at the statutorily required time for making recommendations, (April 25, 1982) the Oklahoma Tax Commission did not have resolution as to the validity of its 1981 Study and that the 1982 Study was incomplete as same is not required or even possible to complete until the third Monday in June of each year, (68 O.S. 1981, §2473) the mandated time for filing of abstracts of assessments by the county assessors with the Oklahoma Tax Commission; and that, in order to, in good faith, comply with 49 U.S.C. §11503, recommendation was made for assessment of all rail transportation property of any railroad operating within Oklahoma at the same percentage of Oklahoma full value (use value/true market value) as the statewide average local assessment percentage for commercial and industrial property.

15. Defendant specifically admits Plaintiff's paragraph number 15.

16. Defendant specifically admits that 68 O.S. 1981,

§2456 requires the State Board of Equalization to certify the assessed values of property of railroads and public service corporations to the various county assessors on or before the **third Monday** in June of each year; that the assessment of such property is complete when the State Board of Equalization is mandated to meet on the **fourth Monday** in June to equalize local assessments, 68 O.S. 1981, §2463.

17. Defendant specifically admits that 68 O.S. 1981, §2462 enjoins certain powers and duties upon the Oklahoma Tax Commission regarding equalization of local assessments. Defendant specifically denies that §2462 is pertinent or applicable herein, except that it is the statutory duty which causes the annual studies of levels of local assessments to be completed by the Oklahoma Tax Commission.

18. Defendant specifically denies that 68 O.S. 1981, §2463 is pertinent or applicable herein; and, Defendant advises that in Poulos III the highest court of this state had before it issues and allegations based upon no evidence as to levels of local assessments **except** the 1981 Study of the Oklahoma Tax Commission; at page 1273, the Court decreed:

> "There being no valid reason shown for not adopting the 12% ratio as recommended by the Commission, we hereby determine by judicial decree that all property within the State of Oklahoma subject to ad valorem taxes shall be assessed at 12% of its taxable value with permissible inter-county deviations of not more than 3% above or below the mean, and that said percentage shall apply to the 1982 tax year and thereafter until such time as the same shall be changed by the recommendation of the Commission and the determination by the Board based upon good and sufficient valid, legal grounds as

provided in 68 O.S. 1971, §2463.";
further Defendant advises that in 1982, Plantiffs protested, under 68 O.S. 1981, §2466, valuation of its Oklahoma rail transportation property; that administrative hearing was not had prior to filing the Complaint herein; that the 1982 administrative protests of public service corporations were resolved in **McLoud Telephone Company v. State Board of Equalization, et al.,** decided December 16, 1982; that in **McLoud,** the 26% assessment percentage applied to Oklahoma full value of taxable property of the public service corporations, other than railroads, to calculate assessed value was upheld; and, that the Court held that assessments by the State Board of Equalization were unaffected by the cases involving uniformity or equalization of local assessments. (**Poulos v. State Board of Equalization,** 552 P. 2d 1134 (Okl: 1975); **Poulos v. State Board of Equalization,** 552 P. 2d 1138 (Okl: 1976); **Cantrell v. Sanders,** 610 P. 2d 227 (Okl: 1980) and Poulos III.)

19. Defendant specifically admits that 68 O.S. 1981, **§24303** authorizes ad valorem taxes do not become **delinquent** if one-half paid on or before January 1 and one-half paid on or before March 31 of each year.

SECTION 306

20. Defendant specifically responds that Section 306 quoted by Plaintiff was amended in 1978 prior to the effective date of the Section and that 49 U.S.C. §11503 is clear, unambiguous and speaks for itself. (Defendant's Appendices: F.)

21. Defendant specifically admits the definition of assessment as set forth in §11503, supra, but denies that assessment is defined to mean any valuation other than the assessed valuation upon which the tax millage is applied as used in §11503 (b)(2).

22. Defendant specifically denies the definition of "transportation property" as alleged; §11053 (a)(3) defines "rail transportation property." Defendant specifically denies that all operating property of the Burlington Northern that is subject to ad valorem taxation by the State of Oklahoma is "transportation property" within the meaning of §11503; Burlington Northern Company report for 1980 indicates the diversified business interests to have property subject to ad valorem taxation in Oklahoma that is not "rail transportation property." (Defendant's Appendices: G.)

23. Defendant specifically admits the definition of "commercial and industrial property" as set out in §11503. Defendant responds that in 1981, the assessment percentages applied to the use valuation (true market value) of locally assessed commercial and industrial property by the 77 county assessors had a statewide average of 10.87%; that in 1981 the assessment percentages applied to the Oklahoma full value (true market value) of railroad and public service corporation property ranged from 8.25% to 35%, the Constitutional maximum, constituting a range of deviation of 26.75% (Defendant's Appendices: H); that for 1982 ad valorem tax assessment purposes, the Oklahoma Tax Commission treated property of railroads and public service corporations as separate and distinct classes of property because such classifications are specifically referred to in the Constitution and Statutes of this state and decisions of the Oklahoma Supreme Court; that the 1982 recommendations of the Oklahoma Tax Commission and the 1982 assessments of the State Board of Equalization removed any discriminatory effect created by a range of assessment percentages within each of the two classes by assessing the property of any corporation within each class at a single, uniform assessment percentage (i.e., railroads at

10.87% and public service corporations at 26%). (Defendant's Appendices: H and J.)

24. Defendant specifically denies Plaintiff's paragraph numbered 24. Defendant specifically responds that the congressional studies (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 60% of full value in 1985, while other property was assessed at 20%; that the congressional reports (Plaintiff's Appendix) showed rail property in Oklahoma was assessed at 35% in 1968 while other property was assessed at 18%; that upon enactment of the "4-R Act in 1976, State of Oklahoma began a program to eliminate any discriminatory tax burden on rail transportation property due to ad valorem tax assessments; that the current valuation formula to determine system unit value allocated to Oklahoma was initiated as well as reduction in the assessment percentage (Defendant's Appendices: I); and, that in 1981, the mean assessment percentage applied to rail transportation property was 10.29%; Burlington Northern was assessed at 10.99%. (Defendant's Appendices: J.)

ASSESSMENT OF BURLINGTON NORTHERN'S
PROPERTY FOR THE 1982 TAX YEAR

Defendant specifically denies Plaintiff's paragraph numbered 25. Defendant specifically responds that for the 1981 assessment, based on information from the ICC R-1 report as of December 31, 1980, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was $136,563,361.00; this finding was based upon system unit value of $3,641,689,619.00 allocated to Oklahoma at 3.75%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.99% of its Oklahoma value or $15,014,650.00 assessed value

(Defendant's Appendices: J and K); and, that the Burlington Northern had returned its self-assessed value of Oklahoma taxable property at $14,335,355.00 (Defendant's Appendices: L.) (Prior to the 1959 Amendment to the Oklahoma Constitution limiting assessment to 35%, the "returned value" was ideally "100% value." With the 35% limit, "returned value" became the recommended "assessed value" by the taxpayer or the self-assessment. (Exhibit A to Affidavit of Hal L. Hefner filed April 11, 1983.) Plaintiff's admitted an assessed value in 1981 of $14,335,355.00 which is greater than the 1982 assessed value of $13,717,367.00

26. Defendant specifically denies Plaintiff's paragraph numbered 26.

27. Defendant specifically responds that the ratio study set out hereinbefore was conducted by the Oklahoma Tax Commission and that the statewide average assessment percentage applied to commercial and industrial property by the various county assessors was 10.87% in 1981.

28. Defendant specifically denies Plaintiff's paragraph numbered 28. Defendant specifically responds that for the 1982 assessment, based on information from the ICC R-1 report as of December 31, 1981, the Oklahoma Tax Commission made findings that the Oklahoma allocated value of the system unit value of Burlington Northern's rail transportation property was $126,194,731.00; this finding was based upon system unit value of $3,574,921,544.00 allocated to Oklahoma at 3.53%; that the Oklahoma Tax Commission recommended and the State Board of Equalization assessed the Burlington Northern at 10.87$ of its Oklahoma value or $13,717,367.00 assessed value. (Defendant's Appendices: B and M.)

29. Defendant specifically denies Plaintiff's paragraph numbered 29, except, Defendant specifically admits the assessment by the State Board of Equalization on May 19,

1982. (Defendant's Appendices: B.)

30. Defendant specifically admits Plaintiff's paragraph numbered 30.

31. Defendant specifically admits that the Plaintiff protested the May 19th assessment and specifically deny all other allegations contained in Plaintiff's paragraph numbered 31.

32. Defendant specifically responds that Defendant has no exact knowledge of Plaintiff's paragraph numbered 32.

33. Defendant specifically denies Plaintiff's paragraph numbered 33.

BURLINGTON NORTHERN'S SECTION 306 §11503) CLAIM

34-43. Defendant specifically denies each and every allegation set forth in Plaintiff's paragraph numbered 34 through 43. Defendant specifically responds that Plaintiff's paragraphs numbered 34 through 43 present a pure valuation (appraisal) controversy, unaccompanied by any discrimination; that the State of Oklahoma has lowered year after year the assessed values of railroad property in compliance and specifically has **continually** lowered the tax burden of Burlington and its predecessor, the St. Louis and San Francisco Railroad Company; that the decrease in tax burden of this Plaintiff has been **very** substantial; that Congress determined that there existed instances of excessive assessments and, hence, tax discrimination in 1965 and for ths reason 1965, as a benchmark for the expression of certain values, which are, of course, not constant due to the effects of inflation on "Dollar" figures, is used to demonstrate the serious reduction in tax burden that Plaintiff has enjoyed due to the 4-R Act; that, a real Dollar comparison shows to what very significant degree Oklahoma has lowered Burlington's "assessment"; that,

where an assessment decreases, assuming tax rates are unchanged, then taxes paid will accordingly be decreased; that since Burlington has made no averment of tax rate discrimination, it must be assumed that the purported "discrimination" arises solely from the assessment figure itself; that a historical analysis shows that even discounting inflation, Burlington's system values have inexorably been lowered over a thirty-three (33) year period (see Exhibit "A" to Affidavit of Hal L. Hefner); that when these figures are adjusted for inflation based upon the rate of inflation, as calculated by the Implicit Price Deflator for Railway Equipment, United States Department of Labor, then the amounts are compared on a constant Dollar basis, and the extreme reductions Oklahoma has made in Plaintiff's assessment amounts are readily apparent; (Affidavit of Gene Tyner, Sr.); that, for example, in 1965 Dollars, the assessment of Frisco was $29,680,459.00. In 1981, Burlington's assessment was $15,014,650.00 ($4,438,866.17; 1981 Dollars equivalent value in 1965 based upon Implicit Price Deflator Indices); that in 1982, the disputed year, Burlington's assessment was $13,717,367.00 ($3,703,689.00; 1982 Dollars equivalent value in 1965); that these figures show that the 1965 assessment of $29,680,459.00 has been reduced in the subsequent seventeen years to a figure (expressed in comparable values) of $3,703,689.00; that this is a **decrease** of approximately 799.93% in Burlington's assessment amount from the benchmark year, 1965, wherein Congress found tax discrimination; that the 1981 assessment figure of $15,014,650.00 expressed in 1982 Dollars is: $16,410,562.50; that the 1982 disputed assessment (also in 1982 Dollars), therefore, expresses a **reduction** of approximately 16% in assessment amount over the prior tax year (Exhibit "F" to Tyner Affidavit); that when actual assessment amounts (affidavit of Hal Hefner) are com

pared, there has been a constant reduction up to and **including** the tax year (1982) in question; that when comparisons are calculated discounting the effects of inflation (affidavit of Gene Tyner, Sr.) then these constant reductions expressed in the same value, are even more significant; that **never** in modern history has either the Oklahoma Tax Commission (through its recommendation) or the Oklahoma State Board of Equalization (through its assessment) raised or inflated Burlington's Oklahoma system assessment amount from that of the previous year; that the decline of Burlington's assessment has been continuous and significant; that when rates of reduction from the 1965 assessment (Tyner Affidavit, Exhibit "F") are compared to rates of reduction of the railroad's rendered value (Tyner Affidavit, Exhibit "E"), Oklahoma's rate of decrease is greater up to 1982. However, in 1982, the State Board's assessment drops another 2.25% to 12.50% of what it assessed in 1965. Nevertheless, Burlington proposes its value to drop to 10.71% of what it rendered in 1965 or, stated differently, to approximately one-third that which it rendered the prior year (29.25% to 10.71%).

44. WHEREFORE, Defendant prays that this Court deny and refuse to grant any relief to Plaintiffs and dismiss Defendant with cost.

OKLAHOMA TAX COMMISSION

_____

J. LAWRENCE BLANKENSHIP
General Counsel

_____

DONNA E. COX
Attorney

2501 Lincoln Boulevard
Oklahoma City, OK 73194-0011
(405) 521-3141

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing "Response of Defendant Oklahoma Tax Commission to Complaint for Injunctive and Declaratory Relief" was mailed, postage prepaid, to:

James W. McBride and
Gregory G. Fletcher
Suite 1101
1700 K Street, N.W.
Washington, D.C. 20006

Michael Minnis
Suite 1310
First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102

James B. Franks
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, Oklahoma 73105

Dated this 21st day of April, 1983.

_____

Donna E. Cox

May 27, 1982

Mr. Tom Daxon
State Auditor and Inspector and
Secretary, State Board of Equalization
111 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: Assessment of Oklahoma Property of
Burlington Northern Railroad Company

Dear Mr. Daxon:

On behalf of Burlington Northern Railroad Company, which this firm represents in the State of Oklahoma, a complaint is hereby lodged pursuant to 68 O.S. 1971 §2466 in protest of the assessed valuation of the above-referenced property. The basis of the protest of this assessed valuation of $13,717,367 for 1982, as set forth in your letter to Mr. T. C. Wehner, Springfield, Missouri, dated May 21, 1982, is that it is not properly computed, grossly excessive, void and legally insufficient.

A hearing before the State Board of Equalization is hereby requested including a request for adequate notification of the date of said hearing, so that this company may present evidence, including expert testimony regarding the correct basis for valuation.

Very truly yours,

Ben Franklin, of
FRANKLIN, HARMON & SATTERFIELD, INC.

BF:en
cc: Mr. T. C. Wehner
Mr. Steve Wood

July 22, 1983

Mr. Clifton Scott
State Auditor and Inspector and
Secretary, State Board of Equalization
111 State Capitol Building
Oklahoma City, Oklahoma 73105

HAND DELIVERED

Re: 1983 Assessment of the Oklahoma Property of
Burlington Northern Railroad Company

Dear Mr. Scott:

This is in response to your letter of July 15, 1983 setting the assessed value of the Burlington Northern Railroad Company at $13,034,512 for 1983. Such assessed value is based upon a 1983 Oklahoma fair cash value of $119,912,716. Pursuant to 68 O.S. 1981 Section 2466, Burlington Northern hereby protests such assessment as being based upon a value far in excess of true market value of Burlington Northern's property in Oklahoma.

Specifically, Burlington Northern claims that the value is excessive because, in calculating the cost factor, the Tax Commission has failed to take into account the substantial obsolescence present in property of Burlington Northern. Additionally, in arriving at system value, the Tax Commission has given far too much weight to the cost approach and far too little weight to the income approach. As a result of such errors, the 1983 assessment of Burlington Northern is grossly excessive, void and illegal.

Very truly yours,
PIERSON, BALL & DOWD

MM/jl

Michael Minnis

June 20, 1984

Mr. Clifton H. Scott
State Auditor and Inspector and Secretary
State Board of Equalization
111 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: 1984 Assessment of the Oklahoma Property of Burlington Northern Railroad Company

Dear Mr. Scott:

This is in response to your letter of June 14, 1984, advising Burlington Northern Railroad Company ("Burlington Northern") that the State Board of Equalization ("State Board") has fixed the fair cash value of Burlington Northern's property in the State of Oklahoma as of January 1, 1984, at $114,724,690.00. Pursuant to Okla. Stat. Ann., tit. 68, §2466, Burlington Northern hereby protests this determination of fair cash value on the ground that it far exceeds the true market value of Burlington Northern's property in Oklahoma.

The fair cash value proposed by the State Board is excessive because, in calculating the cost factor, the Oklahoma Tax Commission and the State Board failed to take into account substantial obsolescence present in the property of Burlington Northern. Additionally, in arriving at a system value, the Oklahoma Tax Commission and the State Board gave far too much weight to the cost approach, and far too little weight to the income approach. As a result of such errors, the proposed 1984 fair cash value, which will form the basis of Burlington Northern's 1984 assessment, is grossly excessive and illegal.

Burlington Northern contends that the full system value of its property as of January 1, 1984, does not exceed 2.3 billion dollars. This full system value, allocated to the State of Oklahoma at 3.271% and reduced by $919,711.00 to account for the value of non-operating property, produces an Oklahoma fair cash value of $74,313,289.00. The dollar amount of the fair cash value under protest is, therefore, $40,411,401.00 ($114,724,690.00 minus $74,313,289); the amount of the proposed fair cash value which is not under protest is $74,313,289.00.

Your letter of June 14, 1984, unlike previous letters from the State Auditor advising Burlington Northern of its fair cash value (**See** e.g., letters from the State Auditor to Burlington Northern dated July 15, 1983, and May 21, 1982) does not specify either an assessment ratio nor an assessed valuation for Burlington Northern for 1984. Burlington Northern reserves the right, therefore, to object to, or to protest, whatever assessment ratio and/or assessed valuation may be ultimately proposed or adopted by the State Board for Burlington Northern for the 1984 assessment year.

Very truly yours,

Gregory G. Fletcher
Counsel for Burlington
Northern Railroad Company

GGF:rb
cc: Mr. James W. McBride
Mr. Jeffrey D. Lerner
Mr. David Harris
Mr. T. C. Wehner